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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1701

JIM ROSE, WARDEN,
Petitioner,

vs.

JAMES E. MITCHELL and
JAMES NICHOLS, JR.,
Respondents.

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

OPINIONS BELOW

The memorandum opinion of the United States Court of Appeals for the Sixth Circuit was rendered on January 9, 1978, and is reported as *Mitchell v. Rose*, 570 F.2d 129 (6th Cir. 1978). This opinion is contained within the Appendix at pages 127-141.

This case arose as separate petitions for federal habeas corpus relief in the United States District Court for the Western District of Tennessee, Western Division. In the district court these

cases were originally styled: *Mitchell v. Rose, Warden*, Civil C-75-222, and *Nichols v. Rose, Warden*, Civil C-75-265. The memorandum decisions and orders of the district court are not reported, but are contained within the Appendix at pages 98, 106, 121.

The opinion of the Tennessee Court of Criminal Appeals, affirming the convictions of Mitchell and Nichols, was filed on June 5, 1974; and a copy is contained in the Appendix at page 36. This opinion is not reported. The Supreme Court of Tennessee denied certiorari on March 10, 1975. A copy of that court's order is contained in the Appendix at page 42.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the Court of Appeals for the Sixth Circuit was entered on January 9, 1978. The state's petition to rehear was denied by order of that Court filed on March 30, 1978. The petition for certiorari was timely filed within ninety (90) days of that date, and granted by this Court on October 2, 1978. Jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

Habeas corpus is codified in Title 28, United States Code, which provides in pertinent part:

§ 2241. Power to grant writ:

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdiction . . .
>
> (c) The writ of habeas corpus shall not extend to a prisoner unless—
>
> (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . ."

§ 2254. State custody; remedies in Federal Courts;

> (d) In any proceeding instituted in a Federal Court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
>
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
>
> (3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

The Tennessee Rules of Criminal Procedure[1] provide in pertinent part as follows:

Rule 6. The Grand Jury.—(a) Formation of the Grand Jury.

[1] The Tennessee Rules of Criminal Procedure became effective on July 13, 1978. The Rules reflect the effort of the Supreme Court of Tennessee to provide uniform procedure in criminal matters. The Rules are to supplement the existing statutory procedural law, but the Committee comments to Rule 1 state: "It is intended that these rules be applied in every instance in which they address the procedure involved. If they do not expressly or by clear implication relate to the procedure in question, then existing law is to be applied. These rules take precedence over preexisting statutes and case law which are in conflict with them, but statutes passed subsequent to their adoption which conflict with these rules shall control".

(1) Formation at a Regular Term.—The judge of the court authorized by law to charge the grand jury and to receive the report of that body shall, on the first day of each term of court at which a grand jury is required to be impaneled, direct the names of all the qualified jurors in attendance upon the criminal courts of the county to be written on separate slips of paper and placed in a box or other suitable receptacle and drawn out by the judge in open court. The twelve qualified jurors whose names are first drawn shall, with the foreman, be the grand jury for the term and shall attend the court until dismissed by the judge or until the next term.

. . . .

(b) Vacancies on the Grand Jury.

. . . .

(2) Vacancy as to Grand Jury Foreman.—If for any reason the foreman of the grand jury is unable to serve or is relieved, the court shall appoint a new foreman according to Subdivision (g) until such time as the foreman is able to serve or until expiration of his term.

. . . .

(g) Appointment, Qualifications, Term, Compensation, Vote, and Duties of Foreman.—The judge of the court authorized by law to charge the grand jury and to receive the report of that body shall appoint the foremen of the grand juries in the counties of their respective jurisdictions. If concurrent grand juries are impaneled, a foreman shall be appointed for each grand jury. Every person appointed as a foreman shall possess all the qualifications of a juror. The foreman shall hold office and exercise his powers for a term of two (2) years from appointment; however, in the discretion of the presiding judge, he may be removed, relieved, or excused from office for good cause at any time. It shall be the duty of such foremen of grand juries to assist

and cooperate with the district attorney general in ferreting out crime, to the end that the laws may be faithfully enforced; and such foremen are directed out of term to advise the district attorney general with respect to law violations and furnish him names of witnesses, whom the district attorney general may, if he deem proper, order summoned to go before the grand jury at the next term. In term time, the foreman or the district attorney general may order the issuance of supoenas for witnesses to go before the grand jury. The foreman may vote with the grand jury and his vote shall count toward the twelve necessary for the return of an indictment. A foreman shall receive as compensation a sum to be determined by the county legislative body, to be paid out of the county treasury in the same manner as jurors are paid, and shall receive no other compensation for his services. Such compensation shall not be less than ten dollars ($10.00) per day for each day the grand jury of which he is foreman is actually in session and such sum shall not be diminished during his term of appointment.

. . . .

(j) Witnesses Before Grand Jury.

. . . .

(4) Oath of Grand Jury Witnesses.—Witnesses thus summoned may be sworn by the clerk, or by the foreman of the grand jury, who shall indorse the fact on the subpoena, and sign his name to such indorsement officially.

(5) Power of Grand Jury Foreman to Administer Oath.—The foreman of the grand jury shall have power to administer oaths to all witnesses brought before the grand jury to testify as to the violations of the criminal laws in all cases where the clerks of the criminal and circuit courts may administer said oath.

Tennessee Code Annotated provides in pertinent part as follows:

40-1506. Appointment and term of foreman or forewoman.—Judges having criminal jurisdiction in any county, are authorized, and required to appoint the foremen or forewomen of the grand juries in the counties of their respective jurisdictions; and said foremen or forewomen shall hold office and exercise their powers for a term of two (2) years from appointment, unless for good cause, in the discretion of the presiding judge, he may be removed, relieved, or excused from office at any time. Said foreman or forewoman shall be the thirteenth member of each grand jury organized during his term of office, having equal power and authority in all matters coming before the grand jury with the other members thereof. [Acts 1919, ch. 37, § 1; Shan. Supp., § 5832a1; mod. Code 1932, § 10026, Acts 1976 (Adj. S.), ch. 383, § 1.]

40-1507. Qualifications of foreman or forewoman.—Every person appointed as a foreman or forewoman of the grand jury under § 40-1506 shall be at least twenty-five (25) years of age, and shall be a good and lawful man or woman, possessing all the qualifications of a juror. Provided that no justice of the peace shall be eligible for appointment as foreman or forewoman of the grand jury, the provisions of this section requiring that no justice of the peace shall be eligible for appointment as foreman or forewoman of the grand jury shall not apply in those counties where arraignment in criminal cases is had exclusively before general sessions court. [Acts 1919, ch. 37, § 2; Shan. Supp., § 5832a2; Code 1932, § 10027; Acts 1957, ch. 252, §§ 1, 2; 1976 (Adj. S.), ch. 383, § 2.]

40-1510. Duties of foremen or forewomen.—It shall be the duty of such foremen or forewomen of grand juries to assist and cooperate with the district attorney in ferret-

ing out crime, to the end that the laws may be faithfully enforced, and such foremen or forewomen are directed out of term to advise the district attorney with respect to law violations and furnish him names of witnesses, whom the district attorney may, if he deem proper, order summoned to go before the grand jury at the next term. In term time, the foreman or forewoman may order the issuance of subpoenas for witnesses to go before the grand jury, unless otherwise ordered by the district attorney. [Acts 1919, ch. 37, § 4; Shan. Supp., § 5832a4; Code 1932, § 10029; Acts 1976 (Adj. S.), ch. 383, § 5.]

40-1706. Concurrence in true bill.—An indictment cannot be found without the concurrence of at least twelve (12) grand jurors, and, when so found, shall be indorsed "A true bill," and the indorsement signed by the foreman. [Code 1858, § 5093; Shan., § 7055; Code 1932, § 11600.]

QUESTIONS PRESENTED

1. Whether Discrimination in the Selection of the Non-Voting Foreman of the Grand Jury Is a Basis Upon Which a State Prisoner May Be Granted Federal Habeas Corpus Relief When the Subsequent Trial Is Free of Reversible Constitutional Error, When There Has Been No Demonstration of Actual Prejudice and There Is No Rational Basis to Presume Prejudice, and When the State Has Provided an Opportunity for Full and Fair Litigation of the Claim?

2. Whether the Decision of the Court of Appeals Comports With the Clearly Erroneous Standard and With This Court's Decisions Interpreting the Equal Protection Clause?

3. Whether, Assuming Arguendo, Systematic Exclusion of Blacks From the Post of Grand Jury Foreman in Tipton County,

the Doctrine of Harmless Error Can Be Applied When There Has Been No Actual Prejudice and No Rational Basis Exists Upon Which to Presume Prejudice?

STATEMENT OF THE CASE[2]

On October 28, 1972 Claudie Greer and William Nabors were murdered by the respondents during an armed robbery of a cafe[3] in Tipton County, Tennessee. The respondent Nichols began the criminal episode by pistol whipping a customer. Then Nichols, wielding two pistols, forced the proprietor to hand over about five or six hundred dollars. Nichols also took other money from the proprietor and customers in the cafe. Then, for no apparent reason, Nichols fired several shots into the back room of the cafe and fled. Eyewitnesses testified that Claudie Greer, standing in the back room, fell and subsequently died after the shots were fired from the front room. Proof later showed that Greer was killed by a shot from a .38 caliber pistol.

Simultaneously, the co-respondent James Mitchell, armed with a sawed-off shot gun, was in the process of robbing persons in the back room. William Nabors was among these people. When Nabors bent over to pick up some change from the floor, Mitchell shot him through the mouth with the sawed-off shot

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[2] Unless otherwise indicated, the references contained within this statement are to pages of the state court record. The state court record was before both the federal courts below.

[3] The race of the defendants, the victims, or the eye-witnesses was, of course, not an issue at trial. However, since the Court of Appeals has found racial discrimination and presumed prejudice, the race of these people is perhaps relevant here to demonstrate the total absence of prejudice and the lack of any evidence showing discriminatory intent. The only evidence of race appears in Volume II, page 87 of the trial where on redirect examination the cafe's proprietor testified he is black and black customers comprised almost 100 percent of his business. There is nothing in the record to support any conclusion except that the victims and witnesses were also black.

gun, ending his life. Mitchell then went into the front room, took more money from the proprietress and also fled.

The next day Mitchell and Nichols were arrested together in the Memphis apartment of Nichols' girlfriend. A .38 caliber pistol was recovered from Nichols at the time of his arrest, and a ring taken during the robbery was found at the scene of arrest. A sawed-off shot gun and blood splattered clothing were then found in the apartment of Mitchell's girlfriend. After his arrest, Mitchell gave a confession to members of the Memphis Police Department.

Nichols and Mitchell were jointly indicted in two indictments on November 6, 1972. The grand jury was composed of twelve jurors, one being a black woman, and one acting foreman. The regular foreman of the grand jury was unavailable and the trial judge chose a former foreman as his substitute. The former foreman was chosen to serve by the trial judge because he had previously served as a regular foreman, had previously served as an acting foreman, had been willing to perform in the past, and according to the judge's experience had always served well.[4] Although some twenty (20) witnesses were scheduled to testify before the grand jury, the grand juors unanimously voted to indict the respondents after hearing one police officer testify. This witness did not mention the race of the respondents and this fact was not known to either the acting foreman or the other members of the grand jury.[5] The acting foreman did not vote on the indictment because of the unanimity, but he did sign the indictment, as is required by Tennessee law. (T.C.A. § 40-1706).

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[4] See Affidavits submitted by the state trial judge and the acting foreman. These affidavits formed part of the state's response in the U. S. District Court and were also before the Court of Appeals. (App. pp. 102-111).

[5] See Affidavit of acting foreman, App. p. 102, and the testimony on the plea in abatement. App. p. 111.

Prior to trial, the petitioners filed a plea in abatement asking for dismissal of the indictment and alleging the grand jury and foreman were selected in a constitutionally offensive manner. (p. 21). On March 13, 1973 an evidentiary hearing was held in state court. At that hearing, three jury commissioners of Tipton County, three former foremen of the Tipton County Grand Jury, eleven of the grand jurors who indicted the respondents (one was out of town), and the circuit court clerk of Tipton County all testified. All witnesses were subject to full examination by counsel for the respondents. The proof elicited demonstrated the plea in abatement was without merit. There was a total lack of countervailing evidence. The state court overruled the plea in abatement. (App. pp. 35, 36)

Trial was held on March 21 and March 22 of 1973 in the Circuit Court of Tipton County. The state introduced the testimony of five eyewitnesses who identified Nichols and five eyewitnesses who identified Mitchell as the murderers. (pp. 65, 70, 90, 92, 98, 126, 131, 142, 143, 211, 242, 243, 244, 255, 266, 282). In addition, a redacted version of Mitchell's confession was introduced. Proof showed the recovery of the murder weapons from the respondents and showed that a ring stolen during the crime was recovered from the scene of arrest. The defense proof consisted almost wholly of a testimonial denial by Nichols of any participation. The jury found both respondents guilty of first degree murder and sentenced them to sixty years incarceration on each count. (pp. 357-360).

The respondents appealed their convictions first to the Tennessee Court of Criminal Appeals where they made some twelve assignments of error including assignments attacking the composition of the grand jury and the selection process for grand jury foreman. In a unanimous opinion, the Court of Criminal Appeals affirmed the convictions and found, "the facts here do not demonstrate a systematic exclusion of Negroes upon racial

grounds". (App. pp. 38, 39) The Supreme Court of Tennessee denied certiorari. (App. 42).

The respondents' resort to the federal court system began as separate applications for federal habeas corpus relief in the United States District Court for the Western District of Tennessee, Western Division. The initial petitions for habeas corpus relief each included some eleven grounds. In the district court, the cases were consolidated and twice referred to the magistrate for report. The state filed four separate responses, the entire state transcript, and affidavits from the state trial judge and the acting foreman of the indicting grand jury. After reviewing the first state response, the state trial court record, and the first report on reference, the district judge, on February 17, 1976, dismissed all claims except the selection issues and a *Bruton* issue. (App. p. 98). On these issues, the district court ordered further response and another reference to the magistrate. On February 17, 1977, by memorandum and order, the district court found the *Bruton* violation to be harmless beyond a reasonable doubt and further found that the acting foreman was selected for other than racial reasons. The petitions were dismissed. (App. p. 123). A final order denying a motion to amend judgment was entered by the district court on March 23, 1977. (App. p. 124).

The respondents appealed to the Court of Appeals for the Sixth Circuit which reversed the district court on January 9, 1978. (App. p. 127). The Court of Appeals found discrimination in the selection of the grand jury foreman in Tipton County, and set aside the convictions. The state sought the Writ of Certiorari from this Court which was granted on October 2, 1978.

ARGUMENT

I

State Prisoners Should Not Be Granted Federal Habeas Corpus Relief on a Claim Questioning the Selection of the Non-Voting Foreman of Their Grand Jury When Their Subsequent Trial Is Free of Reversible Constitutional Error, When There Has Been No Demonstration of Actual Prejudice and There Is No Rational Basis to Presume Prejudice, and When the Claim Has Been Fully and Fairly Litigated in State Court.

The Court of Appeals for the Sixth Circuit has voided two state first degree murder convictions obtained more than five years ago. The Sixth Circuit's decision is based on a finding that the non-voting acting foreman of the indicting grand jury was selected in a discriminatory manner. The Sixth Circuit has granted habeas corpus relief on the basis of perceived error occurring during the now moot accusatorial stage. The relief has been granted without a demonstration of prejudice and upon a record which can not support any reasonable presumption of prejudice. The Sixth Circuit decision comes after three state courts had denied relief, the district court had dismissed the petitions without an evidentiary hearing, and despite a record which demonstrates:

1. The race of the respondents was unknown to either the acting foreman or other members of the grand jury (App. pp. 28, 29, 33);

2. the grand jury contained a black woman, who testified in state court and established the total absence of any racial consideration; (App. p. 32)

3. the regular foreman was unavailable and a former foreman was picked by the trial judge to replace him solely because the trial judge knew of his demonstrated ability, his willingness

to serve, and his availability; App. pp. 19-24, 105, 106, 112, 113)

4. the acting foreman did not vote on the indictment because of the grand jury's unanimity; (App. p. 105)

5. although some twenty witnesses were scheduled, the grand jury unanimously voted to indict after hearing one witness; (App. p. 24)

6. the selection of the grand jury itself is an issue previously resolved in favor of the state; (App. p. 122)

7. the subsequent trial was without reversible constitutional error and the petit jury was not an issue;

8. the evidence against respondents at trial included five eyewitness identifications for each, a confession, recovery of the murder weapons from the respondents, and other physical evidence; and (App. pp. 91, 116-121)

9. the issue of grand jury foreman selection was fully and fairly litigated in state court. (App. pp. 3-36)

The Great Writ, habeas corpus ad subjiciendum, has deservedly enjoyed a prestigious place in the history of Anglo-American jurisprudence. Elaborate and scholarly discussions of the Great Writ and its evolution can be found in the decisions of this Court and other legal writings. See *Fay v. Noia*, 372 U.S. 391, 399-426, 449-463 (1963); *Prieser v. Rodriguez*, 411 U.S. 475, 484-487 (1973); *Stone v. Powell*, 428 U.S. 465 (1976); "Developments in the Law—Federal Habeas Corpus", 83 Harv. L. Rev. 1038, 1042-62, 1263-74 (1970); Oakes, "Legal History in the High Court—Habeas Corpus", 64 Mich. L. Rev. 451-68 (1966); Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners", 76 Harv. L. Rev. 441, 463-507 (1963). As Mr. Justice Powell wrote in *Schneckloth v. Bustamonte*, 412 U.S. 218, 255-56 (1973):

> Much, of course, has transpired since that first Habeas Corpus Act (citations omitted). The scope of federal habeas corpus for state prisoners has evolved from a quite limited inquiry into whether the committing state court had jurisdiction (citations omitted), to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims (citation omitted); and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions (citation omitted).

The noble purpose of the Great Writ was and should remain to determine whether a violation of a personal constitutional right has resulted in the deprivation of liberty. See *Fay v. Noia*, 372 U.S. at 423, 424. However, through the years this noble purpose has been joined by other purposes at the substantive scope of the writ was expanded. This expansion has resulted from the employment of the Great Writ to further society's interest in preserving the integrity of the judicial system and implementing minimum constitutional standards within the nation's criminal justice system. Society's interests have been fostered by this expansion, but the issue of undeserved or unjust incarceration has become almost secondary. In fact, since this Court's decision in *Fay v. Noia*, federal habeas corpus relief has, in reality, been a continuation of the state appellate process. Society's interests now demand a reconsideration of the applicability of this form of relief to pre-trial constitutional errors which have no real relationship to the deprivation of liberty. The issuance of the writ should again depend primarily on a relationship between constitutional error and deprivation of liberty.

The Sixth Circuit has not determined that Tennessee is incarcerating two possibly innocent individuals. Any reasonable person viewing the overwhelming evidence admitted at trial must conclude that retrial will reach the same result if the state can resurrect evidence which is now more than five and one-half

years old.[6] Therefore, if guilt is unquestioned, if the trial is without reversible flaw, and if there is no basis to reasonably presume any prejudice to respondents from the preceived error, then the rationale supporting the writ's issuance must be remedial. The Sixth Circuit's opinion supports this conclusion: ". . . there is injury to the jury system, to the law as an institution, to the community at large, and to the democratic ideal reflected in the processes of our courts". (See App. p. 140). The result is that a conviction, no matter how overwhelming, can not withstand a pre-trial procedural constitutional error unrelated to the fact finding process. This philosophy is remedial and similar to the rationale which formerly supported federal habeas relief to state prisoners asserting Fourth Amendment claims.

The decision of the Sixth Circuit, in reality, represents an expansion of the substantive scope of federal habeas corpus relief for remedial purposes. At least since *Neal v. Delaware*, 103 U.S. 370, 397 (1881) this Court has sanctioned the extraordinary relief of quashing the indictment when the grand jury itself was selected through a racially discriminatory system. However, not until this case has this extraordinary relief been applied to a situation when only the selection of a non-voting foreman is at issue. The extraordinary relief was allowed in *Neal*, to a great extent, because of a lack of existing alternative remedies, and because of the importance of the grand jury.[7] As a result,

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[6] This condition is not a small consideration and is a significant cost factor. Reconstruction of a trial is never a certainty, especially after five and a half years. The cost to society in terms of money is obvious. The cost in other terms is also quite clear. See, *Stone v. Powell*, 96 S. Ct. at 3050-52; *Schneckloth*, at 259 (Powell, J., concurring) and *Kaufman v. United States*, 394 U.S. 217, 231 (1969) (Black, J., dissenting). Perhaps, the biggest cost is the loss of public confidence in the system. The system has obviously failed when the cost overcomes the benefit. The criminal justice system should not be a game of endurance where guilt or innocence is a secondary consideration.

[7] See also *Hale v. Henderson*, 485 F.2d 266, 272 (6th Cir. 1973) (Lambros, J., concurring).

grand jury selection systems have been changed and society has been the benefactor.[8] The cost has been justified. However, alternative remedies now exist. *Turner v. Fouche*, 396 U.S. 346 (1970) and *Carter v. Jury Commission*, 396 U.S. 320 (1970) were not habeas cases and demonstrate the benefits can be achieved through class action litigation without much of the cost attendant to habeas corpus proceedings. Other alternatives also exist including criminal sanctions, 18 U.S.C. § 243; and the state remedies which in Tennessee include two levels of appellate review and the state post-conviction law. Tenn. Code Ann. § 40-3801, et sequel. Finally, an individual is entitled to seek the direct review of this Court after a decision of the State Supreme Court.

As a remedial device the Sixth Circuit's decision is a failure and classically demonstrates the peculiar inappropriateness of habeas corpus for such purposes. The reindictment and retrial of the respondents does not change the system of foreman selection in Tennessee. The impact of the decision, besides the waste in resources, may only be to subject each trial judge to a subjective scrutiny of his motivations for selection. Thereis no real benefit to society since a racially motivated judge would presumably disguise his true motivations. Assuming error, the cure is not attained, the cost outweighs the benefit, the system has failed.[9]

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[8] See *Whitus v. Georgia*, 385 U.S. 545 (1966) (coding by race eliminated); *Hernandez v. Texas*, 347 U.S. 475 (1954) (exclusion by ancestry barred); *Norris v. Alabama*, 294 U.S. 587 (1935) (rule of exclusion adopted).

[9] Assuming the remedial goal is to assure that black citizens have equal access to the post of foreman, then the position of petitioner is that the present system works. It is fair to assume that the people of Tennessee will today select as their trial judges people of integrity who realize their responsibility to allow and encourage all citizens to participate in the system. It is unfair to test this assumption by history, either in Tennessee or anywhere else. More importantly, if this system does not work then the change is best made through other procedures, including class action litigation (where the relief can be more than retrial affords); legislative action; and even the political process.

In *Stone v. Powell*, 428 U.S. 465 (1976), this court determined that, as the remedial purposes embodied in the Fourth Amendment exclusionary rule would no longer effectively be served through collateral federal habeas corpus relief,[10] the need for § 2254 adjudication of such claims (once the state has provided a full and fair opportunity to litigate the claim) was far outweighed by the judiciary's interests in "(i) the most effective utilization of limited judicial resources; (ii) the necessity of finality in criminal trials; (iii) the minimization of friction between federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded". *Stone v. Powell*, 428 U.S. 465, 491 n.31 (1976).

The proposition here put forth is that the rational of Stone should extend beyond cases involving Fourth Amendment claims and should encompass a case such as the one sub judice, where a constitutional infirmity[11] occurs during the accusatory stage of the criminal process and has been mooted by the subsequent trial and conviction.[12] The nature of respondent's

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[10] 28 U.S.C. §2254.

[11] This characterization is solely for the purpose of presenting this portion of the brief. No concession of error in the selection process is intended.

[12] This very extension of the doctrine and philosophy of *Stone* was expressly recognized by the district court in the instant case. In the post-decision order of March 23, 1977, Chief Judge Brown stated: "Since this court made the determination that this contention be dismissed, our determination is further supported by the decision of the Supreme Court of the United States in *Stone v. Powell*, — U.S. —, 49 L. Ed. 2d 1067 (1976). As we read that decision, where the claim of constitutional error does not go to the integrity of the fact finding process so far as the conviction is concerned, if the petitioner received a full and fair hearing in state court as to his claim, the federal court will not review the determination by the state court. Thus, not only have we found the decision in the state court to be correct, but also it appears that, since the contention was fairly heard in state court petitioners are not entitled to another review here". See App. p. 124.

claim; its attenuated relation to the integrity of the fact finding process, fairness of the trial, or guilt or innocence of the accused; and the particular inappropriateness of federal habeas corpus as a means to adjudicate the interests of society, all weigh against the issuance of the writ in this case.

In *Castaneda v. Partida*, 430 U.S. 482 (1977), Mr. Justice Powell, in dissent,[13] specifically recognized "a strong case may be made that claims of grand jury discrimination are not cognizable on federal habeas corpus after *Stone v. Powell* . . ." Mr. Justice Powell explained in *Castaneda* that the rationale of *Stone* is better applied to a case involving a tainted indictment than a case involving the admission of tainted evidence. As stated by Mr. Justice Powell:

> Unlike the prisoner in Stone, who could complain that his conviction rested on evidence tainted by Fourth Amendment violations and could ask for a new trial with that evidence excluded, the prisoner in this case challenges only the now moot determination by the grand jury that there was sufficient cause to proceed to trial. He points to no flaw in the trial itself. As in *Stone*, the incremental benefit of extending habeas corpus as a means of correcting unconstitutional grand jury selection procedures might be viewed as outweighed by the acknowledged costs to other values vital to a rational system of criminal justice.

Castaneda, at 1287, footnote 1.

The matter sub judice presents facts more appropriately suited for an application of the *Stone* rationale than the facts

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[13] Mr. Justice Powell's dissent was joined by the Chief Justice and Mr. Justice Rehnquist. Mr. Justice Stewart, separately dissenting, stated that he was in substantial agreement with the other dissenting opinions. *Castaneda*, at 1287. The issue of extending the rationale of Stone, was not before the Court in *Castaneda*. The issue had not been addressed in the lower courts and was not briefed or argued in this Court.

before this Court in *Castaneda*. In *Castaneda* the composition of the entire Grand Jury was in question. In this matter, only the selection of the non-voting foreman is in question. Furthermore, in *Castaneda* the Mexican-American surname of the defendant is a fact upon which a presumption of prejudice could rest. In the instant matter the evidence demonstrates that the race of respondents was unknown to the grand jury when the indictment was returned. (App. pp. 28, 29, 33)

As indicated in *Castaneda*, there is no peculiar characteristic regarding claims of grand jury selection irregularities which would weigh against an extension of the *Stone* logic beyond the Fourth Amendment. This Court has previously stated federal habeas relief is not automatically available to a state prisoner who pled guilty and later attacked the grand jury selection process, *Tollett v. Henderson*, 411 U.S. 258 (1973). More recently this Court held a state prisoner was not entitled to habeas relief on grand jury selection grounds when he failed to conform with a state requirement that such objections be raised before trial, absent a showing of both cause and actual prejudice. *Francis v. Henderson*, 425 U.S. 536 (1976). Both the result and rationale of *Stone*, *Francis*, and *Tollett* are inconsistent with the decision of the Sixth Circuit in this case.[14]

Stone, *Francis*, *Tollett* and *Swain* amply demonstrate the sensitivity which this Court has always applied to cases which require a consideration of the need to preserve and maintain rational state procedures even when they affect (and override) federal constitutional claims. The grant of federal collateral relief must be balanced against other values endemic to a rational system of criminal justice; including the need to preserve the integrity of the state system, the need to avoid duplicative judicial effort, and the values of finality.[15] See *Preiser v. Rodriguez*, 411 U.S. 475, 492 (1973); *Case v. Nebraska*, 381 U.S. 336, 340 (1965) (Clark, J., concurring); *Henry v. Mississippi*, 379 U.S. 443, 452-453 (1965); *Younger v. Harris*, 401 U.S. 37 (1971), c.f. Kirkland, the Federal Court Abstention Doctrine, 24 F.R.D. 481 (1959).

[14] See also *Swain v. Pressley*, 97 S.Ct. 1224 (1977) where the availability of an adequate local statutory remedy for the adjudication of federal rights in the District of Columbia was seen as sufficient to vitiate the need for 28 U.S.C. § 2255 relief.

The dual system of review resulting from the expansion of the scope of federal habeas corpus has come under increasingly sharp attack by both federal and state judges and legal commentators as both an inappropriate use of scarce judicial resources and a needless federal imposition on state authority. See Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970), Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963), Speech of Justice Paul C. Reardon, Address at the Annual Dinner of the Section of Judicial Administration, American Bar Association, San Francisco, Cal., August 14, 1972 ((pp. 5, 9, 10) (quoted in part in *Schneckloth v. Bustamonte*, 412 U.S. 218, 264 (n. 21 (1972)).[16]

[15] The value of finality is more than economic. Continual relitigation of alleged errors years after conviction and incarceration is costly in terms of a rational system of corrections and rehabilitation. " . . . we should at least tentatively inquire whether an endless reopening of convictions, with its continued underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders . . . The idea of just condemnation lies at the heart of criminal law, and we should not lightly create processes which implicitly belie its possibility". Bator, supra at 452.

[16] For an example, see *United States ex rel. Stephen J.B. v. Shelley*, 430 F.2d 215 (2d Cir. 1970) where a district judge without hearing any further evidence, annulled the unanimous holding of 13 New York appellate judges including a unanimous opinion of the Court of Appeals. *People v. Stephen J.B.*, 23 N.Y.2d 611, 246 N.E.2d 344, 298 N.Y.S.2d 489 (1969) on the admittedly close question of the application of *Miranda v. Arizona*, 384 U.S. 436 (1966). What made this ruling especially disturbing is that the defendant had al-

Such duplication of effort has not been without substantial cost to the federal judiciary. Petitions for federal habeas corpus filed by state prisoners have increased from 1,020 in 1961 to 7,033 in 1978. Although after *State v. Powell*, the number of such petitions had decreased (down 12.3% between 1976 and 1977), it is apparent that such filings are on the increase again (up 2.4% to 7,033 between 1977 and 1978). During the year 1978, state prisoner petitions (including both civil rights and habeas corpus), represented 12.2% of all civil filings in the district courts. In the appellate courts state prisoner petitions accounted for 7.7% of the filings. Although this marks a decrease of 11.2% over the last year, it is worthy to note that such petitions have taken up over 13% of the appellate work-load in three circuits, amounting to over 27.2% of all filings in the Fourth Circuit. See *1978 Annual Report of the Director of the Administrative Office of the United States Court*, 47, 76.

The determination in 1953 that state procedures for the remedy of federal constitutional claims were inadequate,[17] which, in part, prompted this court's decision in *Fay v. Noia*, 372 U.S. 391 (1963), is no longer true. The states have continuously sought to strengthen their own post-conviction procedures[18] and have not hesitated to disqualify juries where a

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ready been placed on probation, and because of his juvenile status, his conviction carried with it no civil consequences. See *Shelly, supra*, 430 F.2d 215, 219 (dissent). In the instant case the judgment of 10 judges (9 state and 1 district judge) has been overturned by the Court of Appeals.

[17] See Report of the Special Committee on Habeas Corpus to the Conference of Chief Justices, June 1953, printed in H.R. Rep. No. 1293, 85th Cong. 2d Sess. 7 (1958), Reits, Federal Habeas Corpus, 108 U.Pa.L.Rev. 461, 466 (1960), *Case v. Nebraska*, 381 U.S. 336, 339 (1965) (Clark, J. concurring).

[18] See generally, State Post Conviction Remedies and Federal Habeas Corpus, 12 W&M L.Rev. 149 (1970), Eisenberg, Post-Conviction Remedies in the 1970's, 56 Marquette L. Rev. 69 (1972).

prima facie case of discrimination in the choosing of the venire has been shown.[19] The Uniform Post Conviction Procedures Act[20] has been approved in eleven (11) states, and many others have seen fit to pass their own comprehensive statutes in recent years.[21] Justice Powell stated the current position of this Court best in *Stone v. Powell*, ". . . we are unwilling to assume that there now exists a general lack of appropriate sensitivity to constitutional rights in the trial and appellate courts of the states." *Stone v. Powell*, 428 U.S. at 493 (n. 35).

The Sixth Circuit's grant of federal habeas corpus relief in this cause is contrary to recent decisions of this court interpreting the substantive scope of the writ. In fact, the Sixth Circuit's decision represents an unnecessary extension of the writ's substantive scope. The relief ordered in this cause is contrary to the historical and meaningful purpose of the Great Writ. The record demonstrates with unmistakable clarity that there is no unconstitutional deprivation of liberty. Any benefit achieved is available through other means, at much less cost. Without any real remedial impact and without any real

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[19] See *Barrow v. State*, 239 Ga. 162, 236 S.E.2d 257 (1977); *State v. Plenty Horse*, 85 S.D. 401, 184 N.W.2d 654 (1971); *State v. Silva*, 259 So. 2d 153 (Fla. 1972).

[20] 11 U.L.A. § 485 (1966).

[21] See Ga. Code Ann. § 50-105—50-127 (1967), N.C. Gen. Stat. n. 8, § 15-217—15-222 (1959), Wis. Stats. § 974.06 (1969). Partially as a response to particular criticism of the protection of rights in state courts in the south, Tennessee has passed its own detailed Post Conviction Review Act, Tenn. Code Ann. § 40-3801 et seq. (1967), providing for review of any claim of incarceration contrary to the state or federal constitutions. See Eades, Appellant and Post Conviction Relief in Tennessee, 5 Memp. State L. Rev. (1974). The Tennessee courts have further not hesitated to strike down grand juries where a prima facie case of discrimination has been shown. See *Bonds v. State*, 220 Tenn. 555, 421 S.W.2d 87 (1966); *State v. Jefferson*, 529 S.W.2d 654, 680 (Tenn. 1975); *Kennedy v. State*, 186 Tenn. 310, 210 S.W.2d 132 (1946) *cert. denied* 333 U.S. 846 (expressly approved in *Tollett v. Henderson*, 411 U.S. 258, 277 (Marshall, J. dissenting).

question of possible innocence, the issuance of the writ of habeas corpus in this case becomes a hollow victory with no celebrants. The Great Writ should not be employed when neither the personal nor societial benefits can be identified.

II

The Sixth Circuit's Decision Does Not Comport With the Clearly Erroneous Standard and Is Contrary to Decisions of This Court Regarding the Equal Protection Clause.

Tennessee uses the key man system of jury selection. Three jury commissioners are appointed by the trial judge in each county. Following statutory guidelines, these commissioners compile a jury pool from which both grand and petit juries are randomly drawn. *See* Tenn. Code Ann. § 22-223-243 and Tenn. Code Ann. § 40-1501-1505. The grand jury foreman or forewoman[22] is selected in a different manner. The criminal court judge appoints the foreman for a term of two years. The foreman may be chosen from the general population and otherwise qualified to serve on the grand jury. *See* Tenn. Code Ann. §§ 40-1506, 1507. The foreman becomes the thirteenth grand juror and is required by law to sign all true bills. Tenn. Code Ann. § 40-1506, 1706.[23]

The United States Constitution does not guarantee to a state defendant the right to a grand jury. *Hurtado v. California*, 110 U.S. 516 (1884). However, this Court has long held that a criminal defendant is denied equal protection of the law if, as a result of purposeful discrimination, members of his own

[22] Hereinafter, only the masculine designation will be used. The statute uses both.

[23] Tenn. Code Ann. § 40-1706 requires the concurrence of twelve grand jurors to return a true bill. Although the foreman must sign all true bills, his vote is not necessary to indict.

race are excluded from grand jury service. *Strauder v. West Virginia*, 100 U.S. 303, 309 (1880). The early cases involved absolute exclusion but today the principle is established that substantial under-representation constitutes a constitutional violation, if the cause is purposeful discrimination. *Castaneda*, 97 S.Ct. at 1279; *Turner v. Fouche*, 396 U.S. 346, 359 (1970).

A criminal defendant, in order to prove an equal protection violation in the context of grand jury selection, must first establish that the excluded group is a distinct class, singled out for different treatment under the laws. Next the defendant must prove the degree of under-representation. Finally the defendant must show that the selection procedure is susceptible to abuse. *Castaneda*, 97 S.Ct. at 1280; *Alexander v. Louisiana*, 404 U.S. 625, 630, 632 (1972); *Akins v. Texas*, 325 U.S. 398, 403-404 (1945). If substantial under-representation is demonstrated and the other requirements shown, then a prima facie case is made and the burden shifts to the state to rebut the case. *Castaneda*, 97 S.Ct. at 1279; *Alexander*, 405 U.S. at 632; *See also, Whitus v. Georgia*, 385 U.S. 545 (1967).

The method of proving an equal protection violation in the context of grand jury selection is sometimes called the "rule of exclusion." This method of proof may give rise to a presumption of unconstitutional action which will prevail if unrebutted. *Washington v. Davis*, 426 U.S. 229, 241 (1976). However, the essential element of inviduous discriminatory purpose is still required. "The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race." *Washington*, 426 U.S. at 239. A prima facie case fails when the presumption is dispelled by plausible evidence demonstrating the official action was not racially motivated. *Castaneda*, 97 S.Ct. at 1282; *Turner*, 396 U.S. at 361.

There can be no doubt that a Court of Appeals may set aside a district court's findings in a habeas action only if they are

clearly erroneous. Fed. Rule Civ. Proc. 52(a), 81(a)(2); *Castaneda v. Partida*, 430 U.S. 482, 97 S. Ct. 1272, 1286 (1977) (Stewart, J. dissenting). The district court below dismissed the foreman selection issue, finding "that the foreman was selected for other than racial reasons. . . ." and "that this issue had been adequately investigated by the state trial judge and his determination that there had been no racial discrimination was correct."[24] These findings can not be said to be clearly erroneous.

Certainly, black people are a distinct class satisfying the first element of proof. Further, the Tennessee system, which allows the criminal judge to exercise his discretion in selecting a foreman, could be used to discriminate. Therefore, in order to make a prima facie case the respondents were required only to demonstrate substantial under-representation over a significant period of time. The proof on this element is very questionable[25] but was sufficient for the district judge to find a prima

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[24] The district judge also based his decision on *Stone v. Powell*, 428 U.S. 465 (1976), as is discussed above. Although not cited in his memoranda, the district judge's decision is also a correct application of 28 U.S.C. 2254(d).

[25] The opinion of the Sixth Circuit is very misleading on a number of points relating to the evidence adduced by respondents, the rebuttal evidence, and the procedure below:

(a) First, there was no hearing of any kind in district court in this case. All references in the opinion to a "hearing" are to the hearing in state court on the plea in abatement. The transcript of this hearing was before the federal courts.

(b) Second, the opinion states "There has never been a black foreman or forewoman in Tipton County according to the recollections of the trial judge, three jury commissioners, and three former foremen". In fact, the record shows that the three jury commissioners never testified on this issue whatsoever, and the trial judge's affidavit does speak to his recollection but only to the present. *See*, state record, Vol. I, pp. 55-71). Therefore, the total evidence of substantial underrepresentation is drawn from the testimony of three foremen. One had only served for two years in the early seventies. One served

facie case. The state responded with two affidavits, from the acting foreman and the trial judge. These affidavits demonstate with frankness and clarity the solely pragmatic reasons why the foreman was selected. Simply stated, the regular foreman was unavailable so the judge chose a former foreman because of his availability, his willingness, his experience, and his demonstrated ability. The reasons for selection are very credible and demonstrate a responsible and natural course of human action which is wholly void of racial consideration. The district court so found and this finding can not be said to be clearly erroneous.

The decision of the Sixth Circuit is contrary to a long, unbroken line of decisions by this Court requiring proof of intentional discrimination to sustain an equal protection claim. *See Castaneda*, 97 S. Ct. at 1279; *Washington*, 426 U.S. at 239; *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977); *Turner*, 396 U.S. at 361; and *Carter v. Jury Commissioners*, 396 U.S. at 339. Analogous to the facts in *Carter*, the proof here only shows that the post of foreman has not been held by a black according to the recollection of three foremen. Unlike *Carter*, the facts here also show a plausible, credible, non-racially motivated reason for the selection in issue. This reason is different from the general, self-serving explanations rejected by this Court in *Turner*. The reason here is pragmatic and supported by facts admitted by both sides. The rejection of this reason establishes a standard which can only be met by random selection or historical proportional representation. This is contrary to the decisions of this Court. *See especially*, *Carter*, 396 U.S. at 339.

"5 or 6 years" in the early sixties. The third served "several years" in the fifties. Two of them had also substituted. These recollections form the whole proof of underrepresentation. (*See*, state record, Vol. I, pp. 71-82).

The Sixth Circuit decision has in effect extrapolated from the doctrine that "a person intends the natural consequences of his acts". See *Rabinowitz v. United States*, 366 F.2d 34 (5th Cir. 1966). Such a rule may aptly be applied to a situation such as *Rabinowitz* or other cases where the validity of a system is at issue. There a drastic statistical disparity is only plausibly explained by either invalid procedure or intentional discrimination. Thus, historical statistics are valid criteria against which a system may be tested. However, history is not a valid criteria against which one man's motivations may be tested. The system of selection for foremen in Tennessee is essentially—the discretion of one man. When the system is such, then history is irrelevant. Only the individual's motivation and maybe his personal history are valid in assessing his intent. Given these considerations, the prima facie case here built on historical statistics is virtually meaningless. However, the clear and convincing pragmatic motivation set out in the affidavit of the trial judge is most meaningful. The district court accepted these motivations and refused to find discriminatory intent. The district court's finding is not clearly erroneous.

III

Error, if Any, Was Harmless Beyond a Reasonable Doubt.

Assuming, without conceding, error in the selection of the acting foreman and that the issue is cognizable on federal habeas corpus, the error was harmless beyond a reasonable doubt. *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967).

The perceived error involves the selection of the acting foreman. The foreman did not vote for indictment, and his only involvement was to call one witness, swear in the witness, ask the grand jury if they were ready to vote, and sign the indictment. If error, this is a now moot procedural error which had no effect on the integrity of the trial. Ironically, a *Bruton*[26] type error in this case has been declared harmless by all reviewing courts. *Bruton* errors certainly have the potential of affecting the reliability of the fact finding process. The foreman selection error, if any, had no such potential. *See also Brown v. United States*, 411 U.S. 223 (1975).

CONCLUSION

"Our goals are truth and justice, and procedures are but means to these ends. Truth and justice are ultimate values, so understood by our people, and the law and the legal profession will not be worthy of public respect and loyalty if we allow our attention to be diverted from these goals." Oaks, "Ethics, Morality, and Professional Responsibility," 3 B.Y.U.L. Rev. 591, 596 (1975). For these values, and for the other reasons explained in this brief we respectfully pray that the judgment of the Court of Appeals be reversed and that the petitions for the writ of habeas corpus be dismissed.

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[26] *Bruton v. United States*, 391 U.S. 123 (1968).